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Environmental Protection Agency

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Via regulations.gov

Re: Discretion of the U.S. Environmental Protection Agency When Reviewing States' Applications to Assume Section 404 Permitting Authority, 85 Fed. Reg. 30,953 (May 21, 2020), Docket ID # EPA-HQ-OW-2020-0008

Dear Ms. Hurlid:

On behalf of our 1.8 million members and supporters, Defenders of Wildlife ("Defenders") submits these comments in response to the U.S. Environmental Protection Agency's ("EPA's") solicitation of feedback regarding whether the agency's review of a state's application to assume Clean Water Act ("CWA") Section 404 permitting authority constitutes a discretionary action, triggering Section 7 consultation pursuant to the Endangered Species Act ("ESA"). *See Request for Comment on Whether EPA's Approval of a Clean Water Act Section 404 Program is Non-Discretionary for Purposes of Endangered Species Act Section 7 Consultation, 85 Fed. Reg. 30,953 (May 21, 2020).* The EPA's review of these applications ("Assumption Applications") is undoubtedly the discretionary exercise of a federal agency action, requiring the EPA to consult with the U.S. Fish and Wildlife Service ("FWS") and the U.S. National Marine Fisheries Service ("NMFS") before taking any final action on an application. However, in response to the EPA's request for comments regarding the implementation of such consultation, we object to the State of Florida's misguided request that the consultation process be used to short circuit 404 permittee compliance with Section 10 of the ESA. *See 16 U.S.C. § 1539(b).* Statewide Incidental Take Statements ("ITSs") derived from consultation on Assumption Applications would undermine Congress's intent in developing Section 10 of the ESA, and it would not provide remotely sufficient protections for ESA-listed species. Rather, even after a state assumes authority over a 404 program, 404 permit applicants whose actions would result in a take must continue to obtain Incidental Take Permits ("ITPs").

I. Legal Framework of the ESA

"In response to growing concern over the extinction of many animal and plant species, Congress enacted the Endangered Species Act of 1973." *Gibbs v. Babbitt*, 214 F.3d 483, 487 (4th Cir. 2000) (internal citations omitted). The purposes of the ESA are "to provide a program for

the conservation of . . . endangered species and threatened species” and “to provide a means whereby the ecosystems upon which [such] . . . species depend may be conserved.” 16 U.S.C. § 1531(b). “Conservation” and “conserve” mean “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary”—i.e., to recover such species from an imperiled status. *Id.* § 1532(3). Thus, “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). To accomplish this objective, “[t]he language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.” *Id.* at 174. Therefore, the ESA is “a powerful and substantially unequivocal statute.” *Loggerhead Turtle v. Cty. Council of Volusia Cty., Fla.*, 148 F.3d 1231, 1246 (11th Cir. 1998) (citing *Strahan v. Linnon*, 967 F. Supp. 581, 618 (D. Mass. 1997)).

“Congress enacted the [ESA] . . . to protect and conserve endangered and threatened species and their habitats.” *Sierra Club v. U.S. Dep’t of the Interior*, 899 F.3d 260, 268 (4th Cir. 2018) (internal quotation omitted). A fundamental step toward doing so is for FWS or NMFS, depending on their regulatory jurisdiction, to determine whether a species should receive protection under the ESA by adding it to the threatened or the endangered species lists. 16 U.S.C. § 1533(a)(1). The agencies must make this decision “solely on the basis of the best scientific and commercial data available.” *Id.* § 1533(b)(1)(A). Moreover, when a species is listed, FWS or NMFS must, “to the maximum extent prudent and determinable,” “designate any habitat of such species which is then considered to be critical habitat.” *Id.* § 1533(a)(3)(A), (a)(3)(A)(i).

Section 7 of the ESA imposes on each federal agency (the “action agency”) procedural and substantive obligations to promote the conservation of species. *Id.* § 1536(a). Whenever a federal agency plans to authorize, fund, or carry out an action, it must, “in consultation with [FWS or NMFS],” insure that the action “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.” *Id.* § 1536(a)(2). By Congress’s design, the bar for triggering Section 7(a)(2) obligations is low. An agency “action” is defined broadly and includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02. Further, consultation is required whenever an action “may affect” listed species or critical habitat. *Id.* § 402.14(a); *see also Sierra Club v. U.S. Dep’t of the Interior*, 899 F.3d at 269. However, the “may affect” threshold is likewise “relatively low.” *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (quoting *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009)). “Any possible effect, whether beneficial, benign, adverse or of an undetermined character” triggers the consultation requirement. *Id.* (quoting *Lockyer*, 575 F.3d at 1018–19; Endangered Species Act of 1973 Final Rule, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986)) (emphasis in original). Finally, an “action area” means “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02(d).

If the action agency properly determines, with FWS’s or NMFS’s written concurrence, that its action is likely to affect, but not likely to adversely affect, listed species or critical habitat, consultation may terminate at the informal stage without formal consultation. *Id.* §§ 402.13(c),

402.14(b). If the action may adversely affect listed species or critical habitat, the action agency must request formal consultation. *Id.* §§ 402.13(a), 402.14(a). When formal consultation concludes, FWS or NMFS provides the action agency with its biological opinion of whether the effects of the action plus cumulative effects will likely result in jeopardy. *Id.* §§ 402.02 (definitions), 402.14(h) (biological opinions). If FWS or NMFS finds jeopardy will result, it shall suggest “reasonable and prudent alternatives” to the proposed action to avoid the likelihood of jeopardy. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h). Throughout the consultation, the agencies must rely on the best available scientific and commercial data. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).

Congress established the Section 7 consultation process explicitly “to ensure compliance with [the ESA’s] substantive provisions.” *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985). Thus, “[i]f a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA’s substantive provisions will not result.” *Peterson*, 753 F.2d at 764. An agency therefore cannot act until it complies with its Section 7 obligations. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056–57 (9th Cir. 1994).

Both federal agencies and non-federal actors must ensure that actions do not result in unlawful “take” of a species, pursuant to Section 9 of the ESA. Section 9(a)(1) has been referred to as “[t]he cornerstone of the statute.” *Gibbs*, 214 F.3d at 487. This Section prohibits the unpermitted taking of any endangered species of fish or wildlife, 16 U.S.C. § 1538(a)(1)(B), and the ESA allows FWS or NMFS to extend this same prohibition to the taking of threatened species, *id.* § 1533(4)(d) (“Whenever any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species.”). “Take” is defined broadly and encompasses “harassment,” *id.* § 1532(19), which is “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering,” 50 C.F.R. § 17.3.

FWS and NMFS may authorize take through an Incidental Take Statement (“ITS”) or an Incidental Take Permit (“ITP”), depending in large part on the entity that will be engaging in the incidental take. If a biological opinion resulting from the federal consultation process can definitively conclude that both the action resulting from the federal agency and any resulting incidental take will not violate Section 7(a)(2), FWS and NMFS provide the federal agency with an Incidental Take Statement (“ITS”). 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(g)(7), (i). The ITS must specify the amount or extent of permitted incidental take, reasonable and prudent measures necessary to minimize the impacts of take, and terms and conditions to implement those measures. *Id.* If the authorized take is exceeded, the action agency must reinitiate consultation. 50 C.F.R. § 402.14(i)(4).

Because the Section 7 consultation process applies to *federal agency* actions, non-federal actors cannot obtain an ITS by consulting with FWS or NMFS, and instead are required to seek take authorization from FWS or NMFS in the form of an ITP. *See* 16 U.S.C. § 1539(b). To obtain this authorization, persons must submit an application that contains a conservation plan specifying:

- (i) the impact which will likely result from such taking;
- (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
- (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
- (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

Id. § 1539(a)(2)(A). FWS or NMFS may only issue non-federal actors an ITP upon several determinations, such as whether the applicant will in fact be able to minimize and mitigate the impacts of its take to the maximum extent practicable and whether the applicant has sufficient funding to implement its conservation plan. *Id.* § 1539(a)(2)(B).

II. The EPA’s Review of Section 404 Assumption Applications is a Discretionary Activity that Triggers the Agency’s Section 7 Consultation Obligations.

While the EPA’s existing position has been that it lacks the discretionary authority to consult when reviewing Assumption Applications, this position is improperly rooted in its reliance on *National Association of Home Builders v. Defenders of Wildlife*. See Letter from Peter S. Silva, Assistant Administrator, EPA to R. Steven Brown, Executive Director, Environmental Council of the States & Jeanne Christie, Executive Director, Association of State Wetland Managers, Inc. (Dec. 27, 2010) (*citing* 551 U.S. 644 (2007)). The Supreme Court in *Home Builders* determined that the EPA lacks discretion when reviewing states’ applications to assume authority over issuing National Pollutant Discharge Elimination System (“NPDES”) permits pursuant to Section 402(b) of the CWA. 551 U.S. at 671. However, by relying on *Home Builders*, the EPA failed to consider key differences between CWA Sections 402(b) and 404(g)-(h). Not only does the EPA possess discretion when reviewing 404 Assumption Applications, reading consultation out of the Assumption Application review process would repeal the ESA by implication.

A. To Trigger Its Mandatory ESA Obligations, an Action Agency Need Only Possess “Some Discretion” That Can Be Used to Benefit Listed Species.

“The heart of the ESA is Section 7(a)(2).” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011). It is designed to prevent and mitigate harm to listed species and critical habitats from federal agency actions. Federal agencies must scrupulously comply with Section 7 to effectuate Congress’ intent to require agencies to “afford first priority to the declared national policy of saving endangered species,” a priority that takes precedence over their primary missions. *Tenn. Valley Auth.*, 437 U.S. at 185. Section 7 thus embodies the “institutionalization of . . . caution” that Congress intended in enacting the ESA. *Id.* at 178 (citations omitted).

The threshold for triggering Section 7(a)(2) obligations is low. “Section 7(a)(2)’s consultation requirement applies with full force so long as a federal agency retains ‘some discretion’ to take action to benefit a protected species.” *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014) (citations omitted). “Agency discretion presumes that an agency can exercise ‘judgment’ in connection with a particular action.” *Home Builders*, 551 U.S. at 668. “The relevant question is whether the agency *could* influence a private activity to benefit a listed species, not whether it *must* do so.” *Karuk Tribe*, 681 F.3d at 1025 (emphasis in original). Even if a federal agency can only exercise a minimal “degree” of discretion, that discretion is nevertheless sufficient to require ESA compliance. *NRDC*, 749 F.3d at 784. As the necessary corollary to the Supreme Court’s holding in *Home Builders*, when an agency has the ability “to prevent a certain effect” pursuant to its “statutory authority over the relevant actions,” the agency can be “considered a legally relevant ‘cause’ of the effect.” 551 U.S. at 667 (quoting *Dep’t of Transp. v Public Citizen*, 541 U.S. 752, 770 (2004)).

The EPA indeed “retains ‘some discretion’ to take action to benefit a protected species.” *See NRDC*, 749 F.3d at 784 (citations omitted). When Congress amended the CWA to allow states to assume 404 permitting authority, it required the EPA, upon receipt of an application, to share that application with FWS. 33 U.S.C. § 1344(g)(2). Before approving the application, the EPA must “tak[e] into account any comments submitted by” the agency. *Id.* § 1344(h)(1). No such provision exists in CWA Section 402(b). According to the Senate Report for the 1977 amendments to the CWA, this directive to consider comments from FWS was to “[*preserve*] the Administrator’s discretion in addressing the concerns of [the] agenc[y] yet affords [FWS] reasonable and early participation which can both strengthen the State program and avoid delays in implementation.” S. Rep. 95-370, 78-79 (1977). By requiring the EPA to share Assumption Applications and consider feedback from FWS, Congress provided the agency with discretion to consider how state assumption may impact wildlife and exercise its discretion by potentially recalibrating and acting on that feedback. Thus, the EPA possesses a degree of discretion that it can choose to exercise to the benefit of listed species.

Moreover, a statute’s instruction that an agency “shall” approve of delegation if certain criteria are met does not militate exercising discretion during the approval process. The Eleventh Circuit properly analyzed *Home Builders* in deciding that, under the National Flood Insurance Act (“NFIA”) flood insurance provisions, the Federal Emergency Management Agency (“FEMA”) retained the discretion necessary to trigger ESA obligations. *Fla. Key Deer v. Paulison* 522 F.3d 1133, 1143 (11th Cir. 2008). The NFIA states that “[t]he Administrator *shall* make flood insurance available in only those States or areas” that he has determined have satisfied two criteria, including providing satisfactory assurances that these jurisdictions have adopted “adequate land use and control measures” that are consistent with FEMA’s “comprehensive criteria for land management and use.” 42 U.S.C. § 4012(c) (emphasis added). FEMA argued that, as in *Home Builders*, it lacked the requisite discretion in rendering its approval decisions and that its approval decisions were not the legally relevant cause of development threatening listed species. *Fla. Key Deer*, 522 F.3d at 1141, 1143. Rejecting these arguments, the Eleventh Circuit held that FEMA retained broad discretion to consider wildlife protection in light of the statute’s structure and purpose. *Id.* at 1143. Thus, although the text of Section 404(h)(2)(A) does state that the EPA “shall” approve of Assumption Applications if

certain criteria are met, the EPA can nevertheless exercise discretion during the approval process. *See* 33 U.S.C. § 1344(h)(2)(A) (“the Administrator shall approve the program...”).

B. One Must Read the ESA’s Compliance Requirements and the CWA’s Assumption Application Review Procedures in a Manner That Gives Effect to Both Statutes.

A determinative factor in *Home Builders*, repeal by implication, is not at issue in the matter at hand because Congress passed CWA Section 402(b) *before* the ESA and CWA Sections 404(g)-(h) *after* the ESA. *See* 551 U.S. at 662; Pub. L. 95–217, § 67(b), Dec. 27, 1977, 91 Stat. 1600. The majority in *Home Builders* was concerned that the ESA, which was enacted after Section 402(b), would add a tenth, separate criterion to the EPA’s review of states’ applications to assume authority over NPDES permitting. 551 U.S. at 662–63. The Court determined that such an addition would constitute a “repeal by implication” of Section 402(b)’s exclusive criteria. As the Court noted, “[w]hile a later enacted statute can sometimes amend or even repeal an earlier statutory provision, ‘repeals by implication are not favored.’” 551 U.S. at 662. Thus, *Home Builders* found that upholding the ESA’s Section 7 consultation requirement would impermissibly add an additional criterion, thereby “effectively repeal[ing] [a] mandatory and exclusive list” established by Congress. 551 U.S. at 662.

However, Congress passed the ESA in 1973 and passed Sections 404(g)-(h) as amendments to the CWA in 1977. Pub. L. 95–217, § 67(b), Dec. 27, 1977, 91 Stat. 1600. Thus, unlike *Home Builders*, the question of whether the ESA repealed the CWA’s Assumption Application review procedures by implication is not at issue. If anything, the question would be whether Sections 404(g)-(h) repeal by implication the ESA’s mandate to consult. That said, not only is “[t]here is a ‘stron[g] presum[ption]’ that disfavors repeals by implication,” *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1617 (2018) (citations omitted), the ESA and Section 404(g)-(h) are fully capable of coexistence.

The provisions in Sections 404(g)-(h) and Section 7 can operate harmoniously. Congress developed Sections 404(g)-(h) with the understanding that Assumption Applications would not only be put under a microscope by the EPA, they would undergo parallel scrutiny by FWS and NMFS to understand their implications for ESA-listed species and critical habitat. Congress went even further by requiring the EPA to seek FWS’s counsel on wildlife-related matters extending beyond imperiled species by mandating that the agency seek early feedback from FWS on Assumption Applications. 33 U.S.C. § 1344(g)(2), (h)(1). The legislature’s justification for this requirement was twofold:

The committee amendments relating to the Fish and Wildlife Service are designed to (1) recognize the particular expertise of that agency and the relationship between its goals for fish and wildlife protection and the goals of the Water Act, and (2) encourage the exercise of its capabilities in the early stages of planning.

S. Rep. 95-370, 78 (1977). An agency “cannot escape its obligation to comply with the ESA merely because it is bound to comply with another statute that has consistent, complementary objectives.” *Karuk Tribe*, 681 F.3d at 1024 (citations omitted).

Thus, the EPA must consult when reviewing Assumption Applications. Because Congress required the EPA to seek counsel from FWS and to determine whether to implement the agency's input, the EPA possesses a degree of discretion to act to the benefit of listed species. Moreover, the ESA was passed prior to Sections 404(g)-(h), so the parallel demand for the EPA to consult on Assumption Applications would not repeal Sections 404(g)-(h) by implication. Instead the ESA and Sections 404(g)-(h) are complementary. Reading consultation out of the Assumption Application process would invoke a repeal by implication: the exact kind of result that the *Home Builders* court sought to avoid.

III. Consultation on Assumption Applications Cannot Be Used to Authorize Take by Individual Permit Applicants.

The EPA has also requested comments on the implications of consultation on Assumption Applications. 85 Fed. Reg. 30,955. The State of Florida requested that the EPA change its interpretation of whether it must consult on Assumption Applications as a “solution” to the ESA’s requirement that 404 permit applicants receive any necessary incidental take coverage pursuant to Section 10 of the ESA. State of Florida, *EPA’s Authority to Resolve the “Incidental Take” Barrier to State 404 Assumption*, 1 (2019) (“Florida Request”). According to the state, consultation “would allow [FWS] to issue a programmatic Biological Opinion... and a programmatic [ITS] [that] would identify procedural requirements for state 404 permits,” bypassing the Section 10 process. *Id.* However, consultation cannot be manipulated to satisfy a wholly independent provision of the ESA. Applying for an ITP is not a “problem,” it is an action mandated by Congress to address the take—and ultimately the extinction—of imperiled species. Complying with Florida’s request would amount to intentionally bypassing a provision Congress thoughtfully drafted and incorporated into the ESA, and would serve only to flout the legislature’s intent. Florida’s interpretation of individual 404 Permittees’ requirements under Section 10 as being time consuming, regardless of its accuracy, is wholly irrelevant, *see id*; what matters is these legal requirements exist.

Not only did Congress intend that Section 10 exist, its existence is necessary “to halt and reverse the trend toward species extinction, whatever the cost.” *See Tenn. Valley Auth.* 437 U.S. at 184 (ESA serves “to halt and reverse the trend...”). Circumstances in Florida provide a prime example of why this is the case. 135 ESA-listed species occur in Florida, the third-most of any state. Florida Request at 1. According to the Florida Fish and Wildlife Conservation Commission, at least 45 types of major terrestrial, freshwater, and marine habitats exist in the state, such as bay swamps, freshwater marshes, grasslands, and coral reefs. Florida Fish and Wildlife Conservation Commission, *Habitat*, (last viewed July 6, 2020), available at <https://myfwc.com/conservation/value/fwgcg/habitats/>. Were Florida to assume control over issuing 404 permits, it would be responsible for issuing thousands of such permits for countless activities, such as mining, building dams, building docks, agriculture, and real estate development. When applying for an ITP, the actor must present FWS or NMFS with information such as the action that is likely to result in a take, the impacts of that action, alternatives to the action that were considered, and what actions the applicant would take to minimize and mitigate these impacts. 16 U.S.C. § 1539(a)(2)(A)(i)-(iii).

During consultation on an Assumption Application, FWS and NMFS would have no way of anticipating the tens of thousands of scenarios where the actions of a 404 permittee may give rise to a take under the ESA—let alone what impacts the actions may have, potential alternatives, and how they can be minimized and mitigated. Because of this, it would be impossible for FWS and NMFS to determine whether the actions of 404 permittees may cause jeopardy and what steps can be taken in response. Any no-jeopardy determination at this phase, and any resulting ITS, would in essence be an illegal carte blanche for future 404 permittees to take listed species without any meaningful controls. Thus, while the EPA must consult on Assumption Applications, it would be illegal for this consultation to result in incidental take authorization. Instead, non-federal 404 permittees must work directly with FWS or NMFS to receive any necessary take permits as Congress intended—through the Section 10 process.

Finally, any no-jeopardy finding for individual 404 permit applications must be made on a permit-by-permit basis rather than during consultation on a state's Assumption Application. According to the EPA's guidelines for federal review of 404 permit applications, "[n]o discharge of dredged or fill material shall be permitted if it...jeopardizes the continued existence of species listed as endangered or threatened under the [ESA]... or results in likelihood of the destruction or adverse modification of [critical] habitat." 40 C.F.R. § 230.10(b), (b)(3). This language intentionally mirrors that of the no-jeopardy mandate of Section 7(a)(2) of the ESA. *See* 16 U.S.C. § 1536(a)(2). All state laws governing implementation of the 404 program must be either equally or more protective than federal laws. *See* 40 C.F.R. § 233.1(d) ("While states may impose more stringent requirements, they may not impose any less stringent requirements for any purpose."). Were a state to be issued a one-time statewide ITS claiming that no individual permits could lead to jeopardy, this would illegally nullify the requirement that each 404 permit application subject to the 404(b)(1) guidelines undergo an individual jeopardy analysis. Thus, Section 7 consultation on Assumption Applications cannot result in a statewide ITS providing take coverage for individual projects.

IV. Conclusion

We thank you for the opportunity to submit these comments. It is of the utmost importance that the EPA consult when reviewing any state's Assumption Applications. Not only does the EPA possess the discretion that requires it to do so, not doing so could amount to a repeal of the ESA by implication. Moreover, although the EPA is federally mandated to consult on Assumption Applications, that consultation cannot be manipulated to allow individual 404 permittees to circumvent their obligations under the ESA to apply for an ITP authorizing any take arising from their individual projects.

Sincerely,



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